Memorandum Opinion

(Judge T. M. Kennerly).
(Filed April 28, 1955.)

Caption Omitted

MALCOLM R. WILKEY, United States Attorney, and JAMES T. DOWD, Assistant United States Attorney, of Houston, Texas; for Plaintiff.

EVERETT J. LOONEY, of Austin Texas, THOMAS JAMES, of Austin, Texas, MARVIN K. COLLIE, of Houston, Texas, and CLYDE L. WILSON, JR., of Houston, Texas; For Defendant.

April 27, 1955.

MEMORANDUM

The Defendant, George B. Parr, is charged by indictment in this court with having made false and fraudulent income tax returns for the years 1949, 1950 and 1951.

There have been assigned to me for hearing four motions in the case. These have been heard under Local District Court Rule 25, and are disposed of as follows:

1. *Defendant's Motion for Bill of Particulars filed January 3, 1955, under Rule 7(f) of the Federal Rules of Criminal Procedure, reading as follows:*

> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

(a) I think the Government's answers to Paragraphs I, II, III and IV, of Defendant's Motion for Bill of Particulars require that such paragraphs of such Motion be, and they are denied.

(b) I think however, that Paragraph V of Defendant's Motion for Bill of Particulars, should be granted, but *only to the extent set forth in Paragraph V of the Government's Answer to Defendant's Motion.* But, if, after the Government has made the disclosures set forth in said Paragraph V of its Answer, the Defendant is still unable to properly prepare his defense, he may again be heard in this matter.

2. *Defendant's Motion, filed January 3, 1955, for Discovery and Inspection under Rule 16 of the Federal Rules of Criminal Procedure, as follows:*

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

(a) Defendant moves for discovery and inspection of all "books, papers, documents, transcripts and tangible objects" relating to this case and in the "possession of Plaintiff", *which were obtained from the Defendant or belonged to the Defendant or were obtained from others by seizure or process.*

Paragraphs I, II and III of the Government's Answer are as follows:

"I.

The Government does not have in its possession any books, papers, documents, transcripts or tangible

objects relating to the within cause obtained from the defendant.

II.

The Government does not have in its possession any books, papers, documents, transcripts of tangible objects relating to the within cause belonging to the defendant.

III.

The Government does not have in its possession any transcripts relating to the within cause obtained from others by seizure or process."

Defendant's Motion is denied as to the matters set forth in Paragraphs I, II and III of the Government's Answer.

(b) The Government, in Paragraphs IV and V of its Answer, further replies to Defendant's Motion as follows:

"IV.

The Government does have in its possession certain books, papers, documents and tangible objects relating to the within cause, which were obtained from others by seizure or process.

V.

With reference to those items in Paragraph IV above, the Government stands ready to permit the Defendant and his attorneys, under proper supervision and at a time and place designated by the Court, to inspect, copy or photograph these books, papers, documents or tangible objects relating to the within cause provided that:

(a) Defendant specifies which particular books, papers, documents or tangible objects he wishes to inspect, copy or photograph; and

(b) Defendant establishes that the above items were obtained from others by seizure or process; and

(c) Defendant establishes that such items are material to the within cause; and

(d) Defendant establishes that such request then made is necessary to the proper preparation of the defendant's defense; and

(e) Defendant establishes that such request then made is reasonable."

If Subparagraphs (a), (b), (c), (d) and (e) of Paragraph V of the Answer of the Government be sustained, Rule 16 would be made noneffective. Defendant cannot specify what particular matter there is in the possession of the Government until he is awarded discovery and inspection. The Government in its above-quoted answer admits that such matter was seized from others and it would be idle to require Defendant to prove it. Presumably such matter is material to the within cause or the Government would not have seized it. Defendant cannot know what such matter is until he sees and inspects it, and cannot until then say whether it is necessary for the proper preparation of his defense, or whether his request is reasonable.

Discovery and inspection under Rule 16 should be and is granted without the conditions which the Government seeks to impose in Paragraphs IV and V of its Answer.

3. Defendant's Motion for Subpoena Duces Tecum for Honorable Malcolm Wilkey, United States Attorney, under Rule 17(c) of the Federal Rules of Criminal Procedure, reading as follows:

"(c) For Production of Documentary Evidence and Objects. A Subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify

the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

In Bowman Dairy Co. vs. United States, 341 U. S. 219, a case similar to this, it is said that Rule 17(c) is chiefly to expedite preparation for the trial. It is also said:

> "Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such material so as to inform himself.
>
> But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c). There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus

subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief inovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed material. United States v. Maryland & Virginia Milk Producers Assn., 9 F.R.D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial."

In view of defendant's Motion for Bill of Particulars under Rule 7(b), and his Motion for Discovery under Rule 16, I think it would be premature to at this time grant Defendant's Motion for subpoena duces tecum. It may or may not be needed in the preparation for the trial. Defendant's Motion for Subpoena Duces Tecum should and will remain on the Motion Calendar to await the outcome of Defendant's Motions for Bill of Particulars and Discovery.

4. *Defendant's Motion to Change the Venue in this case from the Corpus Christi Division to the Laredo Division of the Court under Rule 21(a) of the Rules of Criminal Procedure, reading as follows* (italics mine):

"(a) For Prejudice in the District or Division. The court *upon motion of the defendant* shall transfer the proceeding as to him to *another district or division* if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

(a) The Government opposes the Defendant's Motion. The pleadings, briefs, affidavits, exhibits, etc., filed and brought forth by both parties constitute a large record which I have examined and considered.

The cases which the Government cites,[1] many of which Defendant also cites, have been examined. They are helpful. They hold generally that a defendant in a criminal case has the burden of proof and must make a proper showing under the statute or rules, in order to obtain a change of venue to another district or division. Each case cited shows the facts in that case and points out why such facts do or do not authorize or require such a change. In most of them a change of venue is denied. They also discuss newspaper publicity, etc., as a ground for a change of venue. In all of them it is held that a change of venue is in the sound discretion of the court

[1] Shockley v. United States, 166 F.(2d) 704 (C.A. 1949), certiorari denied 334 U.S. 830; Dennis v. United States, 171 F.(2d) 986, certiorari granted 337 U.S. 954; United States v. Mellor, (D.C. Neb., 1946) 71 F. Supp. 53, affirmed 160 F.(2d) 757, certiorari denied 331 U.S. 848; Kott v. United States, (5 C.A. 1949) 163 F.(2d) 984; United States v. Florio, 13 F.R.D. 296 (S.D. N.Y. 1952); United States v. Lattimore, 112 F. Supp. 507 (S.D. D.C. 1953); Kerston v. United States, 161 F.(2d) 337 (10 C.A. 1947), certiorari denied 331 U.S. 851; United States v. Carper et al., (D.C. D.C. 1953) 13 F.R.D. 483; United States v. Moran, (2 C.A. 1952) 199 F.(2d) 107; Shushan v. United States, (5 C.A. 1941) 117 F.(2d) 116; Allen v. United States, (7 C.A. 1924) 4 F.(2d) 688; United States v. Mesarosh, (D.C. W.D. Penn. 1952) 13 F.R.D. 180.

and must be determined on the facts of each particular case.

(b) Originally Defendant's Motion was submitted on many affidavits and many newspaper clippings from certain Corpus Christi newspapers filed and offered by Defendant, and a few affidavits filed and offered by the Government. Later the Government asked and was granted permission to and has also filed and offered many affidavits. All these I have carefully studied. They, along with other portions of the record, show the geographic location, population, etc., of the Corpus Christi and Laredo Divisions of the Court and of the county and town in which Defendant resides. They also show the extent of circulation and places of circulation of the newspapers mentioned.

Many different opinions, viewpoints and ideas are reflected by such affidavits. Apparently many of the persons making them are not at all familiar with, or overlooked the fact, that the Court must follow the method fixed and required by law in selecting, summoning, and empaneling a jury in this case. Some of them apparently were so uninformed about the law and court procedure that they erroneously regarded the Motion by Defendant for a change of venue as a reflection on the people of the Corpus Christi Division, etc. Some took sides for or against the Defendant. A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—that there exists in the Corpus Christi Division of the Court so great a prejudice against Defendant that he cannot obtain a fair and impartial trial in this case in such division.

Regardless of their opinions, views, or ideas, substantially all of the persons who made such affidavits mention or refer to the publication of many articles about Defendant in two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defend-

ant has brought and offered in evidence clippings, etc., of a very large number of these articles or publications, extending over a period of several years and on down, which I have studied. I do not undertake to go into details about them, they speak for themselves. They are simply in evidence here and it is not within the province of the Court to either condemn or justify them. It is sufficient to say that the Defendant has therein been given, during recent years, much publicity, generally very unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to Defendant or persons closely associated or said to be associated with him, and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego, and in Duval County, where Defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which Defendant and persons associated, or claimed to be associated, with Defendant are mentioned. Also with respect to the stationing of Texas Rangers in Duval County, the investigation by the Attorney General of Texas and others of Defendant and associates, and the affairs of Duval County and the enforcement of law in such county. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the state of Texas and the United States and others against Defendant and/or those associated with him. Reference is made to the clippings for full particulars. These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against Defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case.

(c) This brings us to the question of where this case should be sent for trial. I discuss the suggestions shown in the record.

I think it is clear that Rule 21(a) hereinbefore quoted must be construed in the light of the Sixth Amendment to our Federal Constitution, as follows (italics mine):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

The construction placed upon this Amendment has uniformly been that unless a defendant in a criminal case *waives his right* to be tried in the district in which the crime was committed, the case cannot be lawfully sent to another district for trial.

The offenses with which Defendant is charged are alleged in the indictment to have been committed in this district and this case must be tried in this district *unless the Defendant has waived his right in that respect.* An examination of the Record and particularly Defendant's Motion, show definitely that he has not done so. The holding here then must be, and is, that this Court is without power to transfer this case to any other district.

I think it is clear that Rule 21(a) hereinbefore quoted, and Rules 18 and 19 of the Federal Rules of Criminal Procedure, must be construed together. Rules 18 and 19 are as follows (italics mine):

> "Rule 18. District and Division.
>
> Except as otherwise permitted by statute or by these rules, the prosecution *shall be had* in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

"Rule 19. Transfer within the District.

In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, *if the defendant consents*, in any division and at any time."

Defendant is charged in the indictment with having committed such offenses in the Corpus Christi Division of the Court, and under Rules 18 and 19 must be tried there unless he has, as provided in Rule 19, *consented* to a trial in some other division.

An examination of the Record and Defendant's Motion shows definitely that in filing and presenting his Motion under Rule 21(a) he has consented, as is his right, to a trial *only* in the Laredo Division. In fact, Defendant says in his brief, "We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi."

It is, therefore, under the law not within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division.

Because of this view of the law I do not deem it necessary to decide, and because the information in the Record as to conditions in the Houston, Galveston, Victoria and Brownsville Divisions is very meager, I do not deem it proper to decide the questions raised as to those divisions.

(d) The Government raises another question.

As I understand the Government's presentation of these matters it did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its Brief filed (italics mine):

"That the Government would be under a *serious handicap* in prosecuting this defendant in the Laredo Division."

I have already discussed the lack of power in the Court to do so. I have also pointed out the state of the record with respect to conditions in the Houston, Galveston, Victoria and Brownsville Divisions.

But I have studied the brief and affidavits of both the Government and Defendant with respect to conditions in the Laredo Division. The Government's affidavits show that certain conditions are believed to exist. Defendant's affidavits show that it is believed that they do not exist. No overt acts are alleged or shown. Apparently there exists a political controversy of long standing at Laredo, and many, or some of those making the affidavits for the Government, and many or some of those making them for the Defendant are in different political camps or hold radically different political views. The two groups, or some of them, seem to now see each other "through a glass darkly". It might be said facetiously that they seem to suffer under "more heat than light". Basing my findings, as I must, wholly on all the affidavits I do not think that the evidence shows that the Government either will or might "be under a severe handicap" in the prosecution of this case as claimed. I find to the contrary.

(c) My conclusion is that the Motion of the Defendant as made should be granted and the venue of the case should be changed from the Corpus Christi Division to the Laredo Division.

Let appropriate orders be drawn and presented in accordance with Paragraphs 1, 2, 3 and 4 hereof.

T. M. KENNERLY
United States District Judge

Concur:

/s/ JAMES ALLRED,
Judge.

Oral Opinion

THE COURT: I think I can dispose of the matter without hearing further from the Government.

As a retired Judge, I receive my work in this district from my brethren, the other Judges, and I received a request from Judge Allred to hear these four motions that are disposed of by the opinion filed.

In the motion for change of venue, I found an enormous record. I think there were more than one hundred affidavits, and certainly more than a hundred finally, because there were some filed after the record came to me. There were very satisfactory briefs, and there were several hundred—I didn't count them, and there may have been five or six hundred—clippings from two daily papers in Corpus Christi.

All of these I considered as carefully as I knew how to consider them, and I found myself settled on one opinion about whether the case should be tried in the Corpus Christi Division. I am doubtful that any Judge in this district, or any other district, reviewing the record as I did, would have reached any other conclusion, and that is that I reached the conclusion that the case should not be tried in Corpus Christi, and that defendant's motion for change of venue should be granted.

In reaching that conclusion, or rather in examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice gen-

erally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.

But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. As you all know, we have in the state courts of Texas a practice by which the judge sometimes of his own motion sends a case here, there and elsewhere. There is no such provision in the federal statutes, and I found, as I understand the law, that I had no authority to transfer the case out of the Southern District of Texas. If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

But as stated, I could not do that as I understand the law.

I then discovered that I could not transfer the case to any other division of the district except Laredo. You gentlemen who were in the case will understand or are familiar with the reasons that I gave in the opinion, which is concurred in by Judge Allred, and I think we are correct in that, that is on the law, that it was not legal, not within the power of the Court, to transfer the case to any place except to Laredo, so the case was transferred there.

Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District, and the Austin Division of the Western District, and I am asked by the Government to dismiss this case in this district. Under the rule—what is it, 46?

Mr. Looney: 48-A, Your Honor.

The Court: 48-A, evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed.

In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

In doing that I am assuming as you want me to assume, that the Court in Austin has jurisdiction of the case. On that point, of course, I do not decide it does or does not, whether it has jurisdiction or does not have jurisdiction. I am going to dismiss this case as requested by the Government.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15612

GEORGE B. PARR, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas.

(July 22, 1955.)

On Motion of Appellee to Dismiss the Appeal and on Motion for Leave to File Petition for Writs of Mandamus and Prohibition.

Before HUTCHESON, Chief Judge, CAMERON, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This appeal is from an order dismissing, on motion of the United States, an indictment in three counts returned against the defendant below, appellant here, in the Corpus Christi Division of the Southern District of Texas, and charging him within such division and district with preparing and causing to be prepared false and fraudulent income tax returns for the years 1950, 1951, and 1952, and filing them with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing them to be deposited at the Corpus Christi Division Office.

Giving notice of appeal from the order, defendant is here attacking it as erroneous and seeking its reversal.

The United States, proceeding under Rule 39(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., "Supervision of Appeal in Appellate Court",[1] has filed a motion to dismiss the appeal on three grounds,[2] and the matter is before us on the motion to dismiss.

Supporting its motion by brief and argument and the citation of many authorities,[3] the United States urges upon us that the only kind of order having the requisite finality to support an appeal in a criminal case is one imposing a sentence and leaving nothing to be done but to enforce by execution what has been determined, and that the order in question determined nothing as to defendant's guilt or innocence. So urging, it insists: that whatever may be the merits of appellant's contentions as to the correctness or incorrectness of the judge's action in entering the order, those contentions are not, they cannot be, for decision here; and that, since the dismissal of the indictment determined nothing except that it would be no longer prosecuted, the determination by us of defendant's contentions must await the entry of, and the appeal from, a final judgment.

On his part, the appellant, realizing that an ordinary dismissal on the motion of the United States of a pending

[1] Cf. Semel v. United States, 158 F(2) 229.

[2] These are: (1) that the order of dismissal is not appealable because not a final decision in a criminal case within the meaning of 28 U.S.C., Sec. 1291; (2) because, as the record shows, the defendant has been indicted in the Western District of Texas, and it is the intention of the government to prosecute that indictment to a final decision there; and (3) because the appeal is frivolous and obviously without merit; and is taken for the purpose of delay.

[3] Particularly Berman v. U.S., 302 U.S. 211; Cobbledick v. U.S., 309 U.S. 323; U.S. v. Swidler, 207 F(2) 47; Lewis v. U.S., 216 U.S. 611; Heike v. U.S., 217 U.S. 423; McLish v. Roff, 141 U.S. 661; Ex parte Altman, 34 Fed. Supp. 106; and U.S. vs. John Doe, 101 Fed. Supp. 609.

indictment is not a final judgment from which an appeal will lie, is here insisting that the order appealed from is not such an order, and this appeal is not such an appeal. So insisting, he thus states his case:

> "It is the position of the accused that (1) the dismissal was filed during the trial without his consent, contrary to the provisions of Rule 48(a) Rules of Criminal Procedure, and (2) the order transferring the case from the Corpus Christi Division to the Laredo Division, Southern District of Texas, pursuant to Rule 21(a) R.C.P., was res judicata of venue and effectively lodged exclusive jurisdiction of the offenses charged by the indictment against accused in the Laredo Division, Southern District of Texas. For these and other reasons stated below, the accused urges that the judgment of dismissal filed May 20, 1955, from which this appeal is prosecuted is an erroneous final decision of the District Court of the United States for the Southern District of Texas, Laredo Division, within the meaning of 28 U.S.C., Section 1291."

In support of his position, as thus stated, appellant cites no federal decision; there is none, holding that an order dismissing an indictment is appealable, none supporting his claim that under federal jurisprudence the order in this case was a final and appealable order. Instead he cites cases dealing with non suits entered in civil cases such as *Cybur Lumber Co.* v. *Eckhart* (5 Cir.) 247 Fed. 284; *Mass. F. & M. Ins. Co.* v. *Schmick*, 58 Fed. (2) 130; Cf. *Marks* v. *Feist, Inc.*, 8 Fed. (2) 460; *Ruff* v. *Gay*, 67 F(2) 684; *Weeks* v. *F. & C. Co.*; 218 F(2) 503; and *Vaughan* v. *City Bank & Trust Co.*, 218 F(2) 802.

He further urges that the order, entered on defendant's motion, transferring the case from the Corpus Christi to the Laredo Division for trial was res judicata as to the jurisdiction and venue of the prosecution of the defendant

for the identical offense charged in the indictment in this case; that the court, therefore, was without authority to dismiss the case under Rule 48(a) Federal Rules of Criminal Procedure, 18 U.S.C.; that under the circumstances the only order of dismissal authorized is with prejudice forever terminating the prosecution of defendant for the offense charged; and that thus the order sought to be appealed from is invested with finality. He, however, cites no federal cases in support of this view. Instead he relies entirely upon decisions of state courts controlled by particular statutes or particular principles or theories of jurisprudence. Basic among them is the case of *Coleman* v. *State*, 35 So. 937; a Mississippi decision holding that *under a statute providing in effect that where an offense is committed in one or more counties that county where the offense was commenced, prosecuted or consummated, where prosecution shall be first begun*, shall have exclusive jurisdiction of the cause, the state could not, after having begun the prosecution in one county, dismiss the indictment and file it in another county. He also cites several civil cases from Texas, one of them holding that under certain conditions interlocutory orders, though not appealable for want of finality, may be complained of on an appeal from a final judgment in the cause, *Coke* v. *Pottorff*, 140 SW(2) 586, and others that, under Texas Rules of Civil Procedure expressly so providing, appeals will lie from certain interlocutory orders.

As his final position, appellant, disputing appellee's claim that the appeal is frivolous, asserts that his claim of prejudice from the dismissal order is meritorious in that if the orders transferring the cause to the Laredo Division and then dismissing the indictment, did not constitute former jeopardy so as to prevent further prosecution, the order of transfer was a holding that he could be prosecuted only in that division and in legal effect prevents his being prosecuted in the Western District of Texas, or anywhere except in the Laredo Division of the Southern District.

Interpreting these contentions and arguments in terms of legal theory, they seem to be: that when, after lengthy hearings, Judge Kennerly granted defendant's motion to transfer the case to Laredo, his ruling was a final and irrevocable adjudication that jurisdiction of the offense of defrauding the revenue was thereby exclusively vested in the Laredo Division of the Southern District of Texas; that it created in the defendant a vested right to be tried there, and there alone; and that, when the government presented the facts to a grand jury and obtained an indictment in the Western District of Texas, and then, as appellant claims, erroneously procured a dismissal of the indictment earlier obtained in the Southern District, it in effect induced the court to enter an order depriving defendant of that right, and thus the order appealed from was invested with finality and was and became a final judgment. Thus, as it seems to us, presenting his position at once on the motion to dismiss and on the merits of the appeal and analogizing the dismissal of the indictment over his objection to a non suit in a civil case over the objection and to the prejudice of the defendant, the defendant argues quite contradictorily: (1) that this deprivation furnishes the element which at once invests the order with finality sufficient to make it appealable and requires its reversal; and (2) that if it stands unreversed, it has the effect of entitling him to an acquittal altogether.

We pass, without consideration or discussion of them, appellant's views on the merits, because, unless the order is final and we think it is not, the merits are not before us, to take up and dispose of the only matter now before us, the finality *vel non* of the order here sought to be appealed from.

We think it clear that none of defendant's claims that it is final are well taken, as bearing upon the finality of the order for the purpose of appeal. All that occurred in this case and the sole purport and effect of the order sought to be appealed from is simply that the United

States has elected to discontinue, and has discontinued, the prosecution of the indictment returned in the Southern District of Texas, and that the order sought to be appealed from is therefore not final but discretionary and interlocutory and not appealable. *Semel v. United States*, 158 F(2) 233, and authorities cited in note 3, *supra*. These, though not on all fours on their facts, do give insight into the problem of "finality" presented here. They, together with Swift, 339 U.S. 684 and Cohen, 337 U.S. 541, indicate the general and consistent approach that an order is "final" only if it terminates the matter in controversy below. When a seemingly interlocutory order has been held appealable, it has been on the theory that irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue.

The matter put in controversy by the dismissed indictment was the defendant's guilt of the crime of tax evasion charged in it. That issue was never reached for determination, let alone determined, and under the controlling authorities cited, *supra*, the appeal must, therefore, be, and it is hereby DISMISSED for want of finality in the order appealed from.

From these views that the order appealed from was not a final order and the court is without jurisdiction of this appeal to be followed by an order dismissing it, completely inconsistent as they are with the theory of protecting and preserving this court's jurisdiction, on which appellant's motion was filed in this cause, it follows that the motion for leave to file petition for writs of mandamus and prohibition must be, and it is, DENIED.

CAMERON, Circuit Judge, I dissent.

CAMERON, Circuit Judge, dissenting:

I.

In its opinion granting motion of appellant Parr to change the venue of the first indictment from the Corpus Christi Division, where it was brought, to the Laredo Division of the Southern District of Texas, the District Court said in part:

> " * * * substantially all of the persons who made such affidavits mention or refer to the publication of many articles about defendant in two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defendant has brought and offered in evidence clippings, etc., of a very large number of these articles or publications, extending over a period of several years and on down, which I have studied. * * * [Later the Court estimated the number as between five and six hundred.] It is sufficient to say that the defendant has therein been given, during recent years, much publicity, unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to defendant * * * and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego and in Duval County, where defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which defendant and persons associated * * * are mentioned. Also with respect to the stationing of Texas Rangers in Duval County, the investigation by the Attorney General of Texas * * *. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the State of Texas and the United States against defendant * * *.

> "These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case."

It was in a jurisdiction pervaded by that atmosphere that the Government initiated this prosecution. In so doing, the Government's attorney asserted that a precedent, observed for twenty years, of bringing such prosecutions at Austin, was broken. Having the right to prosecute at several other points, it chose as the battleground upon which appellant's[1] liberty would be decided a community in which the Government would have had all of the advantage and the appellant would have had a hard uphill fight.

When the motion for change of venue was made the Government opposed the change and offered many affidavits in opposition to it. After an extended hearing in which the parties filed elaborate written briefs, the District Judge granted a change of venue based upon the conditions found by it to exist where the prosecution was brought.

In commenting upon the transfer to the Laredo Division the District Court mentioned that the Government "did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its brief * * *, 'that the Government would be under a severe handicap in prosecuting this defendant in the Laredo Division'." The District Court then proceeded to describe certain political controversies as existing in the Laredo Division, appellant

[1] The matter is before us on appeal from order dismissing the first indictment and also on Petition for Mandamus and Prohibition and Motion to file same. Parr will be referred to in every instance only as appellant.

being in one political camp and some of the prosecuting witnesses being in the other. Having considered the showing fully, the District Court concluded: "I do not think that the evidence shows that the Government either will or might be under a severe handicap in the prosecution of this case as claimed. I find to the contrary". The carefully drawn opinion was written by retired District Judge Kennerly and concurred in by active Judge Allred.

That opinion was filed April 28, 1955 and five days later, May 3rd, the United States Attorney called the District Judge over long distance telephone advising that the Government desired to disiniss the first indictment because a new indictment had been returned in the Western District of Texas. He stated to the judge that he did not believe that the defendant could be heard on the matter under Rule 48. The regular District Judge ruled otherwise, however, and set the motion to dismiss for hearing before Judge Kennerly.

The motion to dismiss the first indictment was filed May 4, 1955 and with it was filed a copy of the new indictment returned in the Western District involving the same facts. With it also was filed a written statement of reasons for the dismissal. The chief reason given was that the Government had chosen to present the new indictment in the Western District and that it had a right so to do, adding that new factors had been introduced in the situation: "Among the recent factors weighing in the overall appraisal of where prosecution should be had should be mentioned the recent decision of the court to transfer venue from Corpus Christi to Laredo in the Southern District of Texas. This means that trial will be had in a division in which neither the taxpayer lives nor the Government chose originally to bring prosecution, and thus establishes a set of circumstances which was never in the contemplation of Government counsel at the time the original prosecution was brought in the Southern District of Texas."

The District Court for the Southern District conducted an extensive hearing on the Government's motion to dismiss the first indictment in which it heard an extended statement by the Government counsel and a like statement by one of appellant's counsel, and the Government counsel was subjected to a short examination by appellant's counsel.

From the statement of Government counsel and the testimony given by him, the chief articulated reason for the motion to dismiss the Corpus Christi indictment was that the Government did not feel that the witnesses for the Government would stand up as well in the Laredo Division as they would elsewhere. In his testimony, the attorney adverted to the fact that it was easier to make proof of venue in the Austin Division (Western District), but his answers, on the whole, failed to sustain that contention. Here is an answer given by the attorney which may be taken as epitomizing the underlying reason for the Government's opposition to trying the case in the Laredo Division:

> "* * * the very fact that the case in the Southern District has now been transferred to Laredo and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a different light on the Government's proof of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Benson here, who was in the employ of Mr. Parr and signed the tax returns, was an employee of Mr. Parr and he has lived down in that area. Not going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case. * * *
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> "As far as the basic facts are, we believe them to [be] the same; as far as the practical problem of proof in a lawsuit, the scene has been altered, the

situation has been altered considerably by the shifting of the case from Corpus Christi to Laredo."

At another point in his testimony Government counsel thus summarized the attitude that the Government had the plain right to shift the scene of the trial and was merely exerting that right:

> "I think it has been very clear from several documents we have filed that we would have preferred the case to remain in Corpus Christi, and it is certainly clear with the action of the Attorney General and myself that the Attorney General prefers that the case go to Austin, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin."

The Judge for the Southern District made it clear in his brief opinion what influenced him to grant the motion to dismiss:

> "Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District * * * Evidently there is some discretion in the court as to the matter of whether the case should or should not be dismissed.
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> "In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was, of course, under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of

[2] It is evident that the transcript omits the word not at this point.

venue, has shown any reason why the case should not be dismissed * * * I am going to dismiss this case as requested by the Government."

Appellant prosecuted an appeal from the judgment entered dismissing the former indictment, and briefs have been filed and that case stands on our docket for decision in due course.

Thereafter, on May 31, 1955 the Government called up criminal case 3866 in the Austin Division of the Western District of Texas, the new indictment, and appellant filed a motion to stay proceedings therein until the appeal could be disposed of. That motion was overruled and appellant filed a motion to transfer the second indictment to the Laredo Division of the Southern District for trial, which was likewise overruled. The District Court for the Western District of Texas thereupon set the new indictment for trial July 18, 1955. Immediately thereafter appellant filed in this Court a Petition for Mandamus and Prohibition together with motion for leave to file the same, and the Government has filed its opposition thereto along with a motion to dismiss the appeal.

II.

I think leave should be granted that the Petition for Mandamus and Prohibition be filed and that an order should be entered at least holding these complex proceedings in *status quo* until the appeal may be heard in due course, and the proceedings can be carried on in an orderly fashion preserving the rights of the appellant and the Government alike. The majority holds that the appellant is entitled to no relief at all, based chiefly upon the ground that it is conceived that appeal does not lie from the order dismissing the first indictment. I think that the appealability of that order presents a serious question. Under the recent decisions of the Supreme Court in *Swift, etc. Co. v. Compania, etc.*, 339 U.S. 684, and *Cohen v. Beneficial, etc. Co.*, 337 U.S. 541, and our decision

in *Tomlinson v. Pulver*, 220 F. 2d 308, there is a probability that appeal does lie from this order. But I see no reason to decide this question now. The Government has offered no explanation at all for its great haste in bringing its indictment returned in May to trial at once. The events forming the basis of the prosecution occurred between four and six years ago. There is no reason why the appeal should not be heard in due course by this court, having the benefit of oral argument of counsel and leisurely study of the briefs.

III.

But we have ample power to deal fully with this situation even if that order is not appealable and there is precise precedent for such a course. In *Atlantic Coast Line R.R. Co. v. Davis*,[3] we sustained Mandamus and Prohibition as proper means for arresting proceedings in order that justice might be done with respect to a non-appealable order. We gave as a reason (185 F.2d 768) for allowing the extraordinary writ that the situation was of such a nature as "renders the likelihood of any fair and effective correction of the action of the Court by subsequent appeal * * * highly improbable, if not impossible". [Citing cases.] The same is true here as regards the probablity of correcting, after possible conviction on the second indictment, any error which may have been made in permitting dismissal of the first indictment. And we noted further that the allowance of the writ was in "aid and maintenance and protection of this Court's appellate jurisdiction." A District Court in Florida had entered an order under 28 U.S.C.A. 1404(a) transferring a civil action to another district for trial. Appeal did not lie from that

[3] 5 Cir. 1950, 185 F.2d 766. Petition for leave to file mandamus, etc. denied by Sup. Ct. 340 U.S. 941, and the cases cited; and see 28 U.S.C.A. 1651(a) and the additional cases collected in the article cited in Note 6 *infra*.

order.[1] Nevertheless we allowed Petition for Mandamus and Prohibition to be filed and ordered the District Court to vacate the transfer order and to proceed with the trial of the case. If the facts justify it, we can grant full and appropriate relief here.

I think the facts do justify it. I would not state my reasons for dissent if I did not feel that this record presents an important question of procedure whose protection appellant is entitled to invoke and whose definition the bench and bar are entitled to have. It is the duty of the courts to hold the scales of justice in equal balance between the Government and a citizen charged with crime in exactly the same manner as those scales are held in litigation between two private individuals.

An instinctive feeling of doubt arises whether these proceedings would be attended with the same results if they were between two private litigants. Suppose private litigant A had sued private litigant B in a civil action and had chosen to lay the venue in the Corpus Christi Division. B came along and filed a motion to transfer to the Laredo Division under 28 U.S.C.A. 1404(a). After an extended hearing and over the opposition of A, an order was entered transferring the case to the Laredo Division.[2] Without waiting for a week to pass, litigant A sought out another forum and there served the same complaint on litigant B proceeding back to the original jurisdiction with the request that the original civil action be dismissed solely on the ground that A did not feel that his witnesses would stand up as well in the jurisdiction to which the transfer had been made. It is not hard to visualize the effectiveness with which counsel could declaim that the

[1] Crummer et al v. duPont, et al, 5 Cir. 1952, 196 F2d 468.

[2] Of course, the case here is stronger for appellant. The transfer here was from a point where prejudice palpably existed in favor of one litigant to a point where prejudice did not exist for or against either litigant.

processes of the courts were being trifled with to harass litigant 'B.

With respect to civil litigation, it has been said that, prior to the passage of 28 U.S.C.A. 1404(a), venue was the "prime prerogative of plaintiffs".[6] It was pointed out that this Act of Congress had transferred some of that prerogative to the defendant and a large portion of that prerogative to the court, to be used by the court in deciding questions of venue on the basis of fairness to both parties. It was further pointed out that the courts have almost universally exercised that prerogative to see to it that the rights of both the parties are protected without advantage to either.

Does not Rule 48(a) have a similar effect with respect to criminal prosecutions? Are we to assume, as the court below manifestly assumed, that venue is still the prime prerogative of prosecutors to be used in a situation like this one to gain an advantage for the Government or to escape from a position of less advantage in which the Government found itself as the result of its own election?

I do not think so. Prior to the adoption of the new rule, the Government had had a free hand and had used it freely. The court below stated in its opinion that in more than twenty years it had never refused the Government in its request for dismissal and it is reasonably clear that this unbroken practice was decisive in its mind.[7]

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[6] "*Forum Non Conveniens* and 28 U.S.C.A. 1404(a)", 23 Miss. Law Journal p. 1 (December, 1951).

[7] Besides indicating its feeling that the Government still had, under Rule 48, practically an absolute right to dismiss, the Court indicated further that, in the hearing of such a motion the defendant had the burden of proving that the indictment should not be dismissed. Both assumptions represent misconceptions of the law. The Government, seeking affirmative action by the Court carried the burden of showing that there was some valid legal reason for the dismissal.

If that is still the law, the innovation in the Rules of Criminal Procedure requiring an order of court before an indictment could be dismissed would be meaningless and without purpose.[7] The manifest basis for the change in procedure was that the Supreme Court, with Congressional approval, was doing with respect to criminal prosecutions, what Congress had done with respect to civil actions: it was taking the choice of venue out of the unfettered hands of the litigants and giving it to the courts to be exercised in a way which would insure justice and equal treatment to all parties.[8]

If that was the purpose and if that is the meaning of the rule, then there is grave doubt whether that purpose

[7] The Notes of the Advisory Committee, 18 U.S.C.A. pp. 537 s contain this comment:

> "The first sentence of this rule will change existing law. The common law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal Courts. * * * This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many states. * * *."

The Advisory Committee had recommended that the right to dismiss be left with Government attorneys with the requirement that written reasons be given. But the Supreme Court rejected that recommendation and inserted the requirement for court approval.

Even before the passage of this rule, one District Court had held that the Court had the power, in the exercise of a judicial discretion, to refuse a requested dismissal, U.S. v. Krakowitz, D.C. Ohio, 1943, 52 F. Supp. 774.

[8] Few cases are cited by counsel and they are not of much help. Two federal cases are brought to our attention, United States v. Haupt, C.A. D.C., 152 F.2d 771, and United States v. Jones, 7 Alaska 378, and both speak in condemnatory terms of the practice of multiple indictments. The practice of dismissing an indictment in order to proceed under a new one in a more favorable climate is condemned in several state court cases, notably Ex Parte Lancaster, Ala. 1921, 89 So. 2d 721, State v. Milano, La. 1916, 71 So. 131, and Coleman v. State, Miss. 1904, 35 So. 937.

and that meaning have been vindicated here. There is no way the Government can escape the conclusion that its actions here were taken in an effort to select a forum in a locale where the atmosphere would be favorable to the Government and not to the defendant."[10] No criticism is directed to such a course. Litigants from time immemorial have jockeyed for positions of advantage and have shopped about in an effort to light upon the most favorable venue situation for their own success. But courts have to be blind to such machinations. They must weigh the facts of the case before them and give judgment based upon the rights of the parties contending as equals and upon a battleground which favors neither.

[10] The Government's attorney had said this, in stating to the District Court the reasons the Government desired the order of dismissal: "These witnesses, in most instances, are reluctant, and in some instances are hostile. We feel that the trial of the case in Laredo, close to the defendant's seat of political power and his associations there, would have an adverse effect on eliciting the truth from the witnesses the Government will be forced to bring in order to establish this case. * * *"

The Atlas shows that Laredo is in Webb County and San Diego is in the adjoining County of Duval, and that the two cities are rather close together. It further shows that Austin is more than one hundred miles away from San Diego. Students of the problem of law enforcement largely agree that government functions at its best at the local level, and that prosecutions are likely to bring more just results when they are conducted where the defendant and the witnesses are known and where the difficult question of law enforcement has its most direct impact. The vast majority of criminal prosecutions are conducted in such an atmosphere. Jurors who have no acquaintance with the defendant or the witnesses and who do not have a knowledge of all of the facts and circumstances surrounding the problem of the enforcement of the law—such as would inevitably be the case in a district so far removed from the site of the happenings forming the basis of the prosecution—are at a great disadvantage.

In passing on the Government's contentions that it would be under a disadvantage in a trial at Laredo, which it had presented fully on the motion for change of venue, the District Court had ruled directly that the Government would not be under a disadvantage there.

The Government made its selection of the battleground in the first instance as it had a right to do. The court found that battleground to be too favorable to the Government and unfair to the defendant. The court changed the battleground to one if adjudicated to be favorable to neither side.[11] To permit the Government, under those circumstances, to repudiate the whole proceeding it had initiated and to move the scene of the fight to another place of its own selection is to open the door to the possibility of grave abuses. Further, such a course would deny appellant rights which he is entitled to have the courts protect.

If it be thought that the views here expressed give hospitality to the concept that the Government does not belong in a favored-litigant class, they are so intended. The mass of litigation, both civil and criminal, to which the Government is party is sufficient to cause the courts increasingly to give most careful scrutiny to the status of the Government as a litigant. In the very nature of things, the Government enters every contest with a citizen with a distinct advantage.[12] Moreover, all who

[11] It is true that the battleground was the choice of the defendant, but the Court found that the rights of the Government would no be prejudiced in the Laredo Division.

[12] This thesis was well developed by a paper read May 30, 1952 to the Judicial Conference for the Fifth Circuit, and a part of the records of that Conference, by Hon. Robert B. Troutman of Atlanta, Georgia. Here is an excerpt from that paper:

> "With this vast power, and these tremendous resources, the United States is, indeed a formidable adversary * * * The ordinary citizen stands in awe when confronted with such litigation. * * * It is a Goliath, a giant in power, whose challenge a modern Saul and all his Captains might with good reason hesitate to accept. More often than not, however, the citizen has no choice. The initiative is on the side of the Government.
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> "The odds apparently are uneven. * * * He is assured, however, that the end and aim of his Government is the pro-

have not been blind must know that it has frequently been treated as a favored litigant. That is not as it should be. When the Government enters litigation with its citizens, it must stand as an equal and must toe the same mark private litigants must come to. It is hard to conceive that a private litigant could make a test run in one jurisdiction and fail, and then start a proceeding in another jurisdiction and get his action to trial on the merits with such speed while, at the same time, the former action was pending and undisposed of, or was improperly dismissed.

IV.

The Government takes the position that appellant has no stake in the continued pendency of the prosecution first brought. That position is untenable. If it should be held that the motion to dismiss that indictment should have been overruled, the parties litigant will have two cases pending in separate jurisdictions and involving the same subject matter. The respective courts called upon to deal justly as between the parties will exercise their respective discretions, having due regard for the dictates of justice as well as for the comity usually observed in such matters.[13] We so held in *Illinois Central* v. *Bullock*, 5 cir. 1950, 181 F.2d 851. The Government argues that,

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tection of his freedom and his 'rights'. In an even broader sense, justice to the individual is its aim. History tells him that those 'rights' were established by litigants with the courage to combat tyrants who sought to deny them, before judges who had the courage to uphold them. In such contests our profession has supplied both the adversary advocates and the judges. The latter have been set apart and charged with responsibility of seeing that justice be done to the individual and to the Government. * * * The seal of the Department of Justice to which they belong contains a motto, '*Qui pro Domina Justitia Sequitur*'. It appears on the flag which flies over the Department's office. Liberally translated, 'The Department of Justice Prosecutes In Behalf Of Our Lady Justice'."

[13] Cf. Lydick v. Fischer, 5 Cir. 1943, 135 F.2d 983.

under *Carpenter* v. *Edmonson*, 5 Cir. 1937, 92 F.2d 895, the District Court for the Western District of Texas would have no discretion but to proceed to hear the case it elected to press. That argument too is unsound. The *Carpenter* doctrine was considerably weakened by *McLain* v. *Lance*, 5 Cir. 1944, 146 F. 2d 341, and was repudiated in the *Bullock* case, *supra*. The law now is that each judge called upon to try a case pending also in another jurisdiction has the right and duty to exercise a judicial discretion as to whether the case will be tried or not.

If that situation should come to pass, it would be incumbent upon the District Court for the Southern District of Texas, and the District Court for the Western District of Texas, each to exercise discretion as to which case should be tried. It may be that discretion so exercised would lead to the conclusion that the cases should be disposed of in the order of their filing. That would not be inconsonant with practices frequently observed.[14] The two courts would, of course, exercise discretion according to their own judgments. The suggestion is made merely to indicate that the Government's argument is wrong and that appellant does have a definite legal interest in the continued pendency of the first prosecution.

V.

It is plain that we have all elements of this controversy before us and are able to do full justice to the parties independently of the question of the appealability of the dismissal order. It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down,

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[14] Cf. Niehaus, et al. v. Magnolia Textiles, 5 Cir. 1949, 175 F.2d 977, and the companion case; Magnolia Textiles, Inc. v. Gillis, et al, Sup. Ct. Miss. 1949, 41 So.2d 6.

it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair.

That judgment transferring the case to the Laredo Division had been reached after full hearing and at manifestly great expense to the Government and appellant. To permit the Government to turn its back upon the entire proceeding conducted in a venue of its own selection, giving it, at the same time, a second choice of venue, and to put the appellant to trial with the added expense which would obviously be entailed, would, under the facts clearly appearing in the record before us, be unjust and in derogation of appellant's rights.

The authorities discussed in III *supra* furnish a clear blueprint of means by which we may do full justice between the parties. I think we should permit the Petition for Mandamus and Prohibition to be filed, and should take full charge of the entire litigation, either (a) preserving the *status quo* while proceeding to hear the appeal on its merits; or (b) reversing the dismissal order for rehearing by the Court of the Southern District guided by proper standards of proof and decision; or (c) ordering that the case in the Western District be transferred to the Southern District and consolidated with the case originated there, and that trial proceed in the Laredo Division. By following one of these alternatives, or a combination of them, we can proceed to grant appellant the protection to which I think he is entitled and can dispense justice which will be effective and not sterile.

These are the grounds of my dissent.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit.